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WHOLE WOMAN'S HEALTH; AUSTIN WOMEN'S HEALTH CENTER; KILLEEN WOMEN'S HEALTH CENTER; NOVA HEALTH SYSTEMS D/B/A REPRODUCTIVE SERVICES; SHERWOOD C. LYNN, JR., M.D.; PAMELA J. RICHTER, D.O.; and LENDOL L. DAVIS, M.D., on behalf of themselves and their patients,

Petitioners,

v.

KIRK COLE, M.D., Commissioner of the Texas Department of State Health Services; and MARI ROBINSON, Executive Director of the Texas Medical Board, in their official capacities,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF *AMICI CURIAE* PLANNED PARENTHOOD FEDERATION OF AMERICA, PLANNED PARENTHOOD OF GREATER TEXAS SURGICAL HEALTH SERVICES, PLANNED PARENTHOOD CENTER FOR CHOICE, AND PLANNED PARENTHOOD SOUTH TEXAS SURGICAL CENTER IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST[1]

Amicus Planned Parenthood Federation of America ("PPFA") is the oldest and largest provider of reproductive health care in the United States, delivering medical services through over 650 health centers operated by 59 affiliates. Its mission is to provide comprehensive reproductive health care services and education, to provide educational programs relating to reproductive and sexual health, and to advocate for public policies to ensure access to health services. Planned Parenthood affiliates provide care to approximately 2.5 million women and men each year. One out of every five women in the United States has received care from Planned Parenthood. PPFA and its affiliates have an interest in ensuring the continued availability of safe and legal abortion throughout the United States.

Amicus Planned Parenthood of Greater Texas Surgical Health Services ("PPGTSHS") and affiliated entities collectively provide a full range of reproductive health care services, including family planning services, testing and treatment for sexually transmitted infections, and cancer screening services throughout eight counties in Texas, providing care to nearly 85,000 patients annually. PPGTSHS provides

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[1] Written consents to the filing of this brief are on file with the Clerk of Court. No counsel for a party authored this brief in whole or in part, and no person other than *Amici* or their counsel made a monetary contribution to the preparation or the submission of this brief.

abortions at licensed ambulatory surgical centers ("ASCs") in Austin, Dallas, and Fort Worth.

Amicus Planned Parenthood Center for Choice ("PPCFC") and an affiliated entity together provide a full range of reproductive health care services, including family planning services, testing and treatment for sexually transmitted infections, and cancer screening services throughout three counties in Texas, providing care to over 35,000 patients annually. PPCFC provides abortions at a licensed ASC in Houston.

Amicus Planned Parenthood South Texas Surgical Center ("PPSTSC") and affiliated entities collectively provide a full range of reproductive health care services, including family planning services, testing and treatment for sexually transmitted infections, and cancer screening services throughout two counties in Texas, providing care to over 20,000 patients annually. PPSTSC provides abortions at a licensed ASC in San Antonio.

PPGTSHS, PPCFC, and PPSTSC ("Texas *Amici*") are the only Planned Parenthood affiliates that provide abortions in Texas. Texas *Amici*, along with other affiliated Planned Parenthood entities, have been trusted providers of reproductive healthcare in Texas for more than seventy-five years.

SUMMARY OF ARGUMENT

Amici Planned Parenthood Federation of America, Planned Parenthood of Greater Texas Surgical Health Services, Planned Parenthood Center for Choice, and Planned Parenthood South Texas Surgical Center ("Planned Parenthood") submit this brief in support of Petitioners. Planned Parenthood opposes abortion restrictions, like the challenged provisions of House Bill 2, 83d Leg., 2d Called Sess. (Tex. 2013) ("HB 2"), that harm rather than serve women's health and prevent women from accessing safe, legal abortions.

Consistent with Petitioners' position in this litigation, Planned Parenthood has always opposed HB 2, working against it tirelessly when it was being considered in the Texas legislature.[2] With respect to the ASC requirement specifically, Planned Parenthood continued to work against it even after HB 2 was pushed through the legislature, submitting comments when the State was developing its implementing regulations. In those comments, Planned Parenthood

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[2] *See* Jeffrey Toobin, *Daughters of Texas: The Fight for Abortion Rights*, New Yorker (Aug. 5, 2013), http://www.newyorker.com/magazine/2013/08/05/daughters-of-texas (stating that "Planned Parenthood, like most medical groups in the state, opposes" HB 2's provisions, including the ASC requirement); Laura Bassett, *Wendy Davis, Texas Democrat, Fights Abortion Bill with 13-Hour Filibuster*, Huffington Post (June 25, 2013), http://www.huffingtonpost.com/2013/06/25/wendy-davis-filibuster_n_3498699.html (reporting that Cecile Richards, President of Planned Parenthood Action Fund, flew to Texas to support legislators opposing HB 2).

noted that the ASC requirement is medically unnecessary given how safe and heavily regulated abortion is, and argued that the requirement would harm the health and violate the constitutional rights of Texas women.[3]

Indeed, contrary to claims made by Respondents, permitting the ASC and admitting privileges restrictions of HB 2 to go into effect will do nothing to further the health of women in Texas. *Amici*, who have provided safe abortions in Texas for decades, can confirm, as the district court properly found, that women do not obtain better care at ASCs or from physicians who have admitting privileges. *See* Pet. App. 146a ("[W]omen will not obtain better care or experience more frequent positive outcomes at an ambulatory surgical center as compared to a previously licensed facility."); *see also id.* (finding that the ASC requirement has "such a tangential relationship to patient safety in the context of abortion as to be nearly arbitrary"); *Planned Parenthood of Greater Tex. Surg. Health Servs. v. Abbott*, 951 F. Supp. 2d 891, 900 (W.D. Tex. 2013) (concluding that "there is no rational relationship between improved patient outcomes and hospital admitting privileges within 30 miles of a facility in which a physician provides

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[3] *See* David Saleh Rauf, *19,000 Weigh in on New Abortion Rule*, San Antonio Express-News (Dec. 11, 2013), http://www.expressnews.com/news/politics/article/19-000-weigh-in-on-new-abortion-rule-5057062.php.

abortion services"), *rev'd*, 748 F.3d 583 (5th Cir. 2014), *reh'g denied*, 769 F.3d 330 (5th Cir. 2014).

Instead, if the challenged provisions are permitted to take effect, there will be dire consequences for Texas women. Contrary to Respondents' suggestion that Planned Parenthood or other providers will simply build more ASCs to accommodate women seeking abortion, HB 2 and other burdensome and medically unnecessary state regulations with which abortion providers must comply and the hostile environment in which they operate will prevent additional health centers from being built. Planned Parenthood saw the tragic outcomes for women that resulted from enforcement of the ASC requirement over a nearly two-week period in October 2014, when over a dozen abortion facilities closed overnight, and the same tragic outcomes will occur should HB 2 take full effect.

The consequences of the Court's ruling in this case will reverberate far beyond Texas. In recent years, states around the country have enacted similar abortion restrictions that purport to advance women's health but fail to do so. Planned Parenthood has challenged a number of those requirements, including in Alabama, Arizona, Ohio, and Wisconsin. Where those laws have been permitted to take effect, women seeking abortion have suffered devastating consequences. In other states, courts that have evaluated the extent to which the restrictions actually promote women's health and their real-world impact on women's ability to access abortions have enjoined them.

If courts are permitted to abdicate their constitutional responsibility to review those restrictions, as the Fifth Circuit did, women's access to safe abortion throughout the country will be endangered.

ARGUMENT

I. THE CHALLENGED TEXAS PROVISIONS, IF PERMITTED TO TAKE EFFECT, WILL HAVE A DEVASTATING IMPACT ON TEXAS WOMEN.

Should the ASC requirement take effect, Texas will be left with only ten abortion clinics. The clinics that remain will be in the four metropolitan areas of Houston, Dallas-Fort Worth, Austin, and San Antonio, with a limited facility in McAllen operating pursuant to the Fifth Circuit's narrow injunction, leaving women in vast swathes of the state hundreds of miles from the closest abortion provider.

Respondents would have this Court believe that this widespread closure of abortion clinics will not place a substantial obstacle in the paths of Texas women seeking abortions. Their position completely ignores the realities of providing abortions in Texas. The overwhelming challenges of compliance with HB 2 and other state restrictions, as well as the difficulties of operating in an environment that is hostile to abortion, will prevent other ASCs from opening and the existing ASCs from expanding. The result for Texas women will be tragic.

A. The Realities of Building and Operating ASCs, Particularly Those That Provide Abortion, Will Prevent Other ASCs from Being Built.

The suggestion that any burden created by the ASC requirement will be remedied because Texas *Amici* or other providers will simply build new ASCs is unfounded. Respts.' Opp. to Appl. for a Stay Pending the Filing and Disposition of a Pet. for a Writ of Cert. at 18, *Whole Woman's Health v. Cole*, 790 F.3d 563 (5th Cir. 2014) (No. 14-50928). It completely disregards the significant challenges involved in building an ASC to provide abortions, as well as the extreme environment in which abortion providers in Texas must operate.

As an initial matter, the Texas *Amici* built ASCs not because such facilities are medically necessary, but to ensure that even if a medically unnecessary ASC requirement were imposed, Texas *Amici* could continue to provide care to their patients. Texas *Amici* built two ASCs only after the Texas legislature enacted medically unwarranted legislation in 2003 requiring abortions at sixteen weeks of pregnancy or later to be performed in ASCs, in order to provide that desperately needed service to patients.[4] Moreover,

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[4] Tex. Health & Safety Code Ann. § 171.004; Jordan Smith, *What Now? What Next?: With Clinics Already Closing, Texas' Extreme Abortion Restrictions Head to the Cts.*, Austin Chron. (July 26, 2013), http://www.austinchronicle.com/news/2013-07-26/what-now-what-next/.

as HB 2 was enacted, given the inherent uncertainty of litigation and the significant time frames involved in building ASCs, PPGTSHS and PPSTSC each made the difficult decision to build ASCs (with PPGTSHS building two and PPSTSC building one) to ensure that no matter what the outcome, they could continue to pursue their mission of providing the full range of reproductive health services to patients.[5] Having built those ASCs, the Texas *Amici* have no current plans to build additional ASCs.

Texas *Amici* can confirm the evidence before the district court and the district court's findings that building an ASC is a lengthy, very expensive process that can be fraught with problems due to opposition to abortion. The district court correctly found that the cost to convert an existing facility to an ASC "will undisputedly approach 1 million dollars and will most likely exceed 1.5 million dollars" and that the cost of acquiring land and constructing a new compliant clinic "will likely exceed three million dollars." Pet. App. at 140a. The actual building costs of the Planned Parenthood ASCs have exceeded the court's

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[5] *See, e.g.*, Stephen Young, *Planned Parenthood Will Open a New Dallas Clinic to Clear Texas' New Hurdles*, Dallas Observer (July 15, 2014), http://www.dallasobserver.com/news/planned-parenthood-will-open-a-new-dallas-abortion-clinic-to-clear-texas-new-hurdles-7114651; Melissa Fletcher Stoeltje, *Planned Parenthood Will Expand Services With New Center*, San Antonio Express-News (Oct. 11, 2014), http://www.expressnews.com/news/local/article/Planned-Parenthood-will-expand-services-with-new-5816986.php.

findings, costing up to 6.5 million dollars per facility to build.[6]

The process of building an ASC, moreover, can take several years from the beginning of fundraising to the completion of construction, six years in the case of PPCFC's ASC in Houston.[7] The effort to open the newest Planned Parenthood ASC, PPSTSC's ASC in San Antonio, took far longer than expected and was beset by challenges. PPSTSC's existing health center did not have the space needed to be retrofitted as an ASC. Raising the substantial funds needed was a significant hurdle, and just getting a suitable property under contract took nearly a year. Local opposition to the clinic resulted in significant delays in construction, including losing building subcontractors because of the presence of protesters at the building site and their efforts to harass individuals involved in the project (and their families).[8] Even after the construction

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[6] *See, e.g.*, Stoeltje, *supra* note 5; *see also* Hannah Levintova & Kristine Stolakis, *Supreme Court Allows Texas Abortion Clinics to Reopen*, Mother Jones (Aug. 28, 2014), http://www.motherjones.com/politics/2014/08/texas-wendy-davis-sb5-abortion-surgical-center (stating that PPGTSHS's Dallas ASC cost $6.1 million).

[7] Becca Aaronsen, *New Abortion Limits, but More Money for Women's Health*, Tex. Tribune (Aug. 9, 2013), http://apps.texastribune.org/politics-of-prevention/new-limits-more-money/.

[8] *See, e.g.*, Jessie Degollado, *Protest Targets Abortion Facility Built to Comply with New Law*, KSAT (Oct. 23, 2014), http://www.ksat.com/news/protest-targets-abortion-facility-built-to-comply-with-new-law; Andrea Grimes, *Anti-Abortion Groups Take to the Courts to Block Abortion Clinic Trying to Comply*

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was completed, meritless zoning challenges brought by local organizations opposed to abortion further delayed the opening of the ASC and caused PPSTSC (and the City of San Antonio) to spend additional time and resources.[9] As a result, PPSTSC opened its ASC nearly a year after it had planned, and had this Court not issued a stay in this case, it would have been unable to provide abortions at its previously-licensed

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With HB 2, RH Reality Check (Feb. 4, 2015), http://rhrealitycheck.org/article/2015/02/04/anti-abortion-groups-take-courts-block-abortion-clinic-trying-comply-hb-2/ (discussing anti-Planned Parenthood organizations' attempts to harass construction companies). PPSTSC's experience was similar to that experienced by other Texas *Amici* when they built ASCs. *See* Bill Murphy, *Houston Planned Parenthood Expansion Draws Protests*, Hous. Chron. (Sept. 9, 2008), http://www.chron.com/life/houston-belief/article/Houston-Planned-Parenthood-expansion-draws-1786909.php (opponents protested outside construction site and contractor's office); Lianne Hart, *Antiabortion Effort Targets Unbuilt Clinic*, LA Times (Dec. 14, 2003), http://articles.latimes.com/2003/dec/14/nation/na-clinic14 (discussing anti-Planned Parenthood campaign to pressure subcontractors to boycott construction of Planned Parenthood health center in Austin).

[9] *See, e.g.*, Mark Reagan, *The Planned Parenthood Facility on Babcock is Properly Zoned and Permitted*, San Antonio Current (Oct. 9, 2015), http://www.sacurrent.com/Blogs/archives/2015/10/09/the-planned-parenthood-facility-on-babcock-is-properly-zoned-and-permitted; Melissa Fletcher Stoeltje, *Lawsuit Calls Foul on New Abortion Facility*, San Antonio Express-News (Jan. 15, 2015), http://www.expressnews.com/news/local/article/Lawsuit-calls-foul-on-new-ambulatory-surgical-6018923.php; MaryAnn Martinez, *Protestors Pressure City Over Planned Parenthood Clinic*, KENS5 Eyewitness News (Apr. 2, 2015), http://www.kens5.com/story/news/local/2015/04/02/protestors-pressure-city-over-planned-parenthood/70814494/.

abortion facility in San Antonio while waiting for the ASC to be completed.[10]

Once open, the costs of operating an ASC – given the numerous requirements imposed on ASCs that are wholly unnecessary to the provision of safe abortions – are prohibitive. *See* Pet. App. at 140a-141a ("Combined with evidence of operational costs and profit margins associated with operating an abortion facility, the court concludes that few, if any, new compliant abortion facilities will open to meet the demand resulting from existing clinics' closure. Existing clinics, unable to meet the financial burdens imposed by the new regulatory regime, will close as a result."). For example, the staffing requirements, including the need for additional nursing and pharmacy staff, are not only unnecessary to the provision of abortion but also exceedingly difficult to comply with. Among other unnecessary requirements, expensive "terminal cleaning," critical in a sterile hospital operating room setting but not medically needed for abortion (and certainly not for the provision of abortion via medication), is required before every

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[10] Even if PPSTSC had the funds to build another ASC, or the ability to raise those funds (which it does not), local opponents of abortion recently obtained changes to the zoning rules to make it harder for ASCs to be constructed in certain parts of San Antonio, specifically to prevent such a new facility. Josh Baugh, *Change in City Zoning Rules For Abortion Providers OK'd*, San Antonio Express-News (Dec. 17, 2015), http://www.expressnews.com/news/local/article/Change-in-city-zoning-rules-for-abortion-6706271.php.

procedure day. The costs of overhead, including maintaining HVAC systems suited to hospital operating rooms but not needed to provide safe abortions, are significant.[11] For all of these reasons, the suggestion that providers, including the Texas *Amici*, will simply build more ASCs should the ASC requirement take effect is not only impractical, but it is also disingenuous.

B. The Admitting Privileges Requirement Combined with Other Challenges of Providing Abortions in Texas Will Further Prevent Other ASCs from Being Built or Expanding Services.

Even if the ASC requirement alone did not pose a virtual brick wall preventing the further expansion of abortion services in Texas, the ASC requirement does not operate in a vacuum, such that a provider with sufficient funds and wherewithal to withstand delays, opposition from protestors, and other challenges may simply build or convert a facility to an ASC and begin providing abortions. On the contrary, the admitting privileges requirement poses an additional (and also medically unnecessary) barrier that makes it extremely difficult, and sometimes impossible, to operate and/or to expand, particularly given

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[11] *See* 25 Tex. Admin. Code §§ 139.1-139.6; Br. for Amici Curiae Am. Coll. of Obstetricians & Gynecologists *et al.* in Supp. of Pet. for Writ of Certiorari, *Whole Woman's Health v. Cole*, No. 15-274, at 10-12.

the challenges of operating in an environment that is hostile to abortion.

As an initial matter, it is extremely difficult for health centers to recruit physicians who already have admitting privileges within thirty miles of the health center because those physicians are often unwilling to provide abortions due to fears of violence, harassment or professional consequences for their separate private practices. *See, e.g.*, *Abbott*, 951 F. Supp. 2d at 901; *Planned Parenthood Southeast, Inc. v. Strange*, 33 F. Supp. 3d 1330, 1333-34 (M.D. Ala. 2014). Other doctors are precluded by their private practice contracts from providing abortions. *Abbott*, 951 F. Supp. 2d at 901. And, while each of these problems exists in the cities, they are particularly acute in smaller communities.

Moreover, a physician who is willing to provide abortions or to travel to another community to do so often cannot obtain admitting privileges within thirty miles of the abortion clinic for a variety of reasons, including that these physicians do not meet hospitals' requirements that they admit a certain number of patients to the hospital each year (because abortion is extremely safe and rarely requires follow up care in a hospital) and that they live and/or work near the hospital. *Id.* at 900-01 (finding it is extremely difficult for abortion providers to obtain admitting privileges because they cannot comply with hospitals' varying requirements). In addition, hospitals control whether or not they grant privileges to a physician and can deny privileges simply because they do not want to be

associated with abortion. *Strange*, 33 F. Supp. 3d at 1343; *Jackson Women's Health Org. v. Currier*, 940 F. Supp. 2d 416, 421 (S.D. Miss. 2013), *aff'd as modified*, 760 F.3d 448 (5th Cir. 2014), *reh'g denied*, No. 13-60599 (5th Cir. Nov. 20, 2014).

Indeed, while Planned Parenthood affiliates provided abortions for many years in Waco, Texas as well as in the West Texas cities of Lubbock, Odessa, San Angelo, and Midland, they have been unable to offer abortions in any of those communities since 2013.[12] Given that these clinics no longer provide abortions, there are no abortion providers between San Antonio and El Paso, a distance of 550 miles. Texas *Amici* are unable to find local physicians in those communities with privileges who are willing to provide abortions due to the size of those communities and the hostility that abortion providers face.[13]

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[12] *See, e.g.*, Hannah Neuman, *Abortion in Waco No Longer an Option*, Baylor Lariat (Oct. 8, 2014), http://baylorlariat.com/2014/10/08/abortion-in-waco-no-longer-an-option/; Kim Soffen, *How Texas Could Set National Template for Limiting Abortion Access*, N.Y. Times (Aug. 20, 2015), http://www.nytimes.com/2015/08/20/upshot/how-texas-could-set-national-template-for-limiting-abortion-access.html?_r=0.

[13] Paul J. Weber, *Planned Parenthood: No New Texas Abortion Clinics*, NBCDFW (June 20, 2015), http://www.nbcdfw.com/news/local/Planned-Parenthood-No-New-Texas-Abortion-Clinics-308718241.html. *See generally* Sandhya Somashekhar, *Admitting-Privileges Laws Have Created High Hurdle for Abortions Providers to Clear*, Washington Post (Aug. 10, 2014), https://www.washingtonpost.com/national/2014/08/10/62554324-1d88-11e4-82f9-2cd6fa8da5c4_story.html.

Planned Parenthood physicians in the past traveled to those communities, but a physician traveling to provide abortions cannot obtain local admitting privileges due to the various hospital requirements outlined above. The same challenges would face Texas *Amici* if they ever sought to provide abortions in the Rio Grande Valley.

As a result of the admitting privileges requirement (and the difficulty of recruiting physicians willing to provide abortions who have or could obtain local admitting privileges), merely having the funds to build and operate an ASC, which itself poses tremendous hurdles, does no good; providers cannot simply build an ASC and begin providing abortions.

The same challenges also make it difficult for existing providers to expand their capacity to provide abortions to women who need them, even if the ASC is built. Many physicians who provide abortions (and have admitting privileges) already balance full-time professional responsibilities with their provision of care for Planned Parenthood and would have difficulty expanding their hours to provide additional services. *See, e.g.*, *Planned Parenthood of Wis., Inc. v. Van Hollen*, 94 F. Supp. 3d 949, 981 (W.D. Wis.), *aff'd*, *Planned Parenthood v. Schimel*, 806 F.3d 908 (7th Cir. 2005). Those physicians are available to a particular abortion facility only one or two days per week, or even less frequently.

The difficulty of expanding services given the small pool of physicians who can and are willing to

provide abortions in Texas is compounded by a separate state requirement that patients undergo a mandatory state-directed counseling session, provided in part by the same physician who will perform the abortion, as well as an ultrasound performed by that same physician, at least twenty-four hours in advance of the abortion.[14] Given that the physician must be available for the initial visit and for the abortion, the availability of physicians to provide additional abortions at the remaining clinics should HB 2 take effect is even further limited.[15] These challenges are enhanced when physicians are temporarily unavailable because of vacations or for personal reasons such as illness.

Indeed, even without HB 2 taking full effect, Texas *Amici* face struggles in providing abortions within the confines of the existing Texas abortion

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[14] Tex. Health & Safety Code Ann. § 171.012. Unless a patient lives more than 100 miles from any provider, the counseling must occur in person. *Id.*

[15] This problem is compounded for medication abortions, since Texas also requires abortion providers to adhere to an outdated protocol for medication abortion requiring *four* visits by a patient to the abortion facility within an approximately two-week period (one for the state-mandated information and three for the abortion). Tex. Health & Safety Code Ann. § 171.063(a)(2). The difficulty, and often impossibility of ensuring that a physician is available for multiple visits, let alone the same physician, makes it extremely difficult for Texas providers to offer medication abortion at all. Indeed, the number of medication abortions in the state dropped dramatically after HB 2. *See infra* Part II.B.

restrictions, which hamper their ability to provide care and cause unnecessary delays.[16] There is, therefore, no reason to believe that additional abortion services will be readily available in Texas, if HB 2 is allowed to take full effect.

C. The Challenged Provisions, If Permitted to Take Effect, Will Harm Texas Women, Rather than Protect Their Health.

Because it is unlikely that new ASCs will be built and because existing ASCs will have difficulty expanding, the challenged provisions, if permitted to take effect, will harm the women of Texas by denying or delaying the care they need.

For some women who must travel to obtain an abortion, the effect of the challenged provisions will be dire. The law's burdens will fall hardest on women who do not have sufficient financial resources, who have jobs without flexible schedules or paid time away from work needed to travel to one of the few remaining abortion providers, or who cannot access child care. Pet. App. 144a ("The act's two requirements erect a particularly high barrier for poor, rural, or disadvantaged women throughout Texas, regardless of the absolute distance they may have to travel to

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[16] *Abortion Wait Times in Texas: The Shrinking Capacity of Facilities and the Potential Impact of Closing Non-ASC Clinics*, Tex. Pol'y Evaluation Project (Oct. 2015), https://utexas.app.box.com/AbortionWaitTimeBrief.

obtain an abortion."). It is, therefore, completely disingenuous for Respondents to pretend that widespread closures of abortion facilities will not place substantial obstacles in the paths of Texas women, particularly women with the fewest financial resources.

For women who have the resources to travel or who are located near the remaining clinics, the impact will be no less devastating. There are more than five million women of reproductive age living in Texas today – the second largest state in both population and geographical size. If this Court upholds the decision below, there will be only ten abortion providers left state-wide (five of them Planned Parenthood facilities). Because as explained above, new ASCs will be unlikely to open and the existing ASCs will face overwhelming barriers to expanding services, many women will be left unable to access care, or to access it in a timely manner. And while abortion is safe throughout pregnancy, both its risk and cost increase with delay.[17] This means that rather than improve women's health, these restrictions will actually make many women's abortions *less* safe.

The devastating impact of these restrictions was confirmed during the nearly two-week period in October 2014 when the ASC requirement took effect

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[17] *See* Br. of Amicus Curiae Am. Pub. Health Ass'n in Supp. of Pet. for Writ of Certiorari, *Whole Woman's Health v. Cole*, No. 15-274, at 22-23.

prior to this Court entering a stay.[18] A dozen providers shuttered their operations overnight, and the following day, Texas *Amici*'s health centers were inundated with desperate phone calls from women who had planned to obtain care from those now-shuttered providers.[19] On October 3, 2014, PPCFC's call center received 572 phone calls from the Houston area, more than six times the usual call volume for a Friday. Some of these patients had received phone calls from providers with whom they had scheduled appointments informing them that the providers could not treat them. Others had arrived at the shuttered providers' facilities for their appointments only to find out that they could not obtain the care they needed.[20]

One woman had traveled to Houston to obtain an abortion from one of the shuttered providers. She had her first visit with that physician on Thursday, as required by Texas law, and had already undergone the mandatory ultrasound. The abortion was scheduled for the next day, and she was staying in a Houston hotel, having left her young children at home with a friend. When she reached out to PPCFC, she

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[18] Doris Dixon, *What Happens when Abortion Clinics Close*, MSNBC (Oct. 15, 2014, 3:30 PM), http://www.msnbc.com/msnbc/what-happens-when-abortion-clinics-close; *Texas Abortion Ruling Means More Calls, Longer Waits at Clinics*, S.F. Gate (Oct. 12, 2014), http://www.sfgate.com/news/article/Texas-abortion-ruling-means-more-calls-longer-5818346.php.

[19] Dixon, *supra* note 18.

[20] *Id.*

was frantic and said that she needed to get home to her children. PPCFC tried to help her make arrangements to remain in Houston for another night so that she could be treated. In the end, she decided that she could not be away from her children another night, and left PPCFC sobbing.[21]

This story is just one of many that Texas *Amici* heard, and it does not even demonstrate the full extent of the burden placed on women when abortion facilities are forced to close, since this woman was relatively privileged, with the means for travel and an overnight stay and the ability to obtain some child care. As explained above, for women without such means, the effects of the challenged requirements are even more extreme.

Thus, there is no doubt that restrictions at issue here would place substantial obstacles in the paths of Texas women seeking care.

II. PERMITTING THE CHALLENGED PROVISIONS TO TAKE EFFECT WILL ENDANGER WOMEN SEEKING SAFE ABORTION ELSEWHERE IN THE UNITED STATES.

Texas is not the only state in recent years to enact abortion restrictions that purport to further women's health but in fact do not actually serve that goal. Planned Parenthood affiliates throughout the

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[21] *Id.*

country have challenged those restrictions to ensure that women can continue to access safe and legal abortions. And those cases, which this case will certainly impact, demonstrate the important role that the courts play in protecting constitutional rights. The Court should ensure that abortion restrictions, when viewed in light of the real-world contexts in which women live and providers operate, actually promote women's health and do not impose burdens that are undue. Without such scrutiny, a woman's right to choose will remain the illusory one it was rendered by the decision below.

A. Other Courts Have Enjoined Admitting Privileges Requirements After Concluding That They Would Impose an Undue Burden on Women's Right to Abortion

Planned Parenthood affiliates, along with other providers, have challenged local admitting privileges requirements in Alabama and Wisconsin, and courts in those states, like the district court below, have properly held that such laws impose a constitutionally undue burden on women.

1. Wisconsin

In 2013 (the same year Texas enacted HB 2), the Wisconsin legislature passed Wisconsin Act 37 of 2013, codified at Wis. Stat. Ann. § 253.095, which, like Texas HB 2, required admitting privileges at a

hospital within thirty miles of the location where the abortion is performed. The law was enacted less than a month after it was proposed, and went into effect essentially overnight, even though, as the Seventh Circuit observed in upholding the permanent injunction against it, there is "no way" a physician who provides abortion "or any other type of doctor for that matter, could obtain admitting privileges so quickly." *Planned Parenthood of Wis., Inc. v. Schimel*, 806 F.3d 908, 911 (7th Cir. 2015). The law was opposed by all of the leading state medical associations, the only physician who testified in the legislature testified against it, and the only testimony in its favor was provided by a representative of Wisconsin Right to Life. *Id.* at 914.

Planned Parenthood of Wisconsin ("PPWI") and Affiliated Medical Services ("AMS"), the only outpatient abortion providers in the state, challenged the law. If it had been permitted to take effect, it would have had devastating consequences for Wisconsin women seeking abortion, just as HB 2 would in Texas. A full trial on the merits showed that the two physicians at AMS, the state's largest clinic and one of only four remaining in the entire state, are unable to obtain privileges. In fact, those physicians are ineligible to even *apply* for privileges: As physicians whose practices consist almost exclusively of outpatient practice, they "lack recent experience in performing inpatient medical procedures for which hospitals would grant admitting privileges." *Id.* at 916. Given how safe abortion is, moreover, they also cannot

satisfy requirements imposed by hospitals of certain minimum admissions, despite being the most experienced providers of abortion in the state. *Van Hollen*, 94 F. Supp. 3d at 978, 983.

Furthermore, AMS is unable to hire new physicians who have or who can obtain admitting privileges because of hostility to abortion and the physicians who provide them. As the Seventh Circuit stated, "it is difficult to hire such doctors because of the vilification, threats, and sometimes violence directed against abortion clinics and their personnel in states, such as Wisconsin, in which there is intense opposition to abortion." *Schimel*, 806 F.3d at 917; *Van Hollen*, 94 F. Supp. 3d at 983 ("[S]ignificant barriers to recruiting and retaining practitioners present a real and growing threat to the availability of abortion services in Wisconsin."). The district court noted that "[o]ne of the most striking aspects of the trial" was testimony by physicians about their "personal experiences with harassment and threats," which included harassment at work and at home. *Van Hollen*, 94 F. Supp. 3d at 983. PPWI's Medical Director, a board-certified ob-gyn and Assistant Professor of Obstetrics and Gynecology at the Medical College of Wisconsin, testified:

> I am verbally harassed every time I go to Planned Parenthood. Even when I'm going to the colposcopy clinic I may be harassed. I've had protesters at my home. I've had protesters march up and down my street. They have gone door to door to my neighbors handing

> them pamphlets, videotapes, saying "We are here because a babykiller . . . lives in your neighborhood."

Id.

If Wisconsin were able to enforce the admitting privileges requirement, AMS would be forced to close, with several immediate consequences for Wisconsin women. First, the PPWI health centers that would remain lack the capacity to provide the needed care. An eight-to-ten-week delay for abortions would ensue, the district court found, driven in part by the overwhelming difficulty of recruiting new physicians who are both willing to provide abortions and able to obtain necessary admitting privileges. *Id.* at 990.[22] The delay will push some women outside the window when abortions are available, completely denying them that care, while forcing other women to obtain later abortions, which are not only more expensive, but carry more risk. Second, AMS is the only outpatient provider in Wisconsin that provides abortions at or after nineteen weeks of pregnancy, and closing AMS will result in women being unable to obtain

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[22] Because of hospital requirements that physicians with privileges admit a certain number of patients as well as demonstrate ongoing competence in performing inpatient procedures, the long-term ability of PPWI's physicians to maintain privileges is in doubt. "Planned Parenthood's clinics could also face having to close or significantly reduce the abortions they perform, within a few years, despite currently having doctors with admitting privileges." *Schimel*, 806 F.3d at 917; *see also Van Hollen*, 94 F. Supp. 3d at 984.

abortions in Wisconsin after that point in pregnancy. *Schimel*, 806 F.3d at 918.

Travel to Chicago would not, and could not, substitute for the closure of AMS. Not only is the availability of out-of-state clinics legally irrelevant, *id.* at 918-19, but the trip would also prevent low-income women, who make up the majority of the women seeking outpatient abortion in Wisconsin, from obtaining abortions:

> [A] 90-mile trip is no big deal for persons who own a car or can afford an Amtrak or Greyhound ticket. . . . But for [patients below the poverty line] . . . a round trip to Chicago, and finding a place to stay overnight in Chicago should they not feel up to an immediate return to Wisconsin after the abortion, may be prohibitively expensive. . . . These women may also be unable to take the time required for the round trip away from their work or the care of their children. The evidence at trial, credited by the district judge, was that 18 to 24 percent of women who would need to travel to Chicago or the surrounding area for an abortion would be unable to make the trip.

Id. at 919.

Thus, the Wisconsin privileges requirement, like HB 2, would have "substantially curtailed the availability of abortion in Wisconsin, without conferring an offsetting benefit (or indeed any benefit) on women's

health," *id.* at 916, and therefore the Seventh Circuit properly held it unconstitutional.

2. Alabama

The same year as Texas and Wisconsin, Alabama also enacted a similar hospital privileges law, House Bill 57, Reg. Sess. (Ala. 2013). If that law had been permitted to take effect, it would have forced three of the state's remaining five abortion clinics to close, leaving the three largest cities in the state (Birmingham, Mobile and Montgomery) without abortion providers.[23] Planned Parenthood Southeast ("PPSE") (which operates health centers in Birmingham and Mobile), along with Reproductive Health Services in Montgomery, challenged that law, and after extended proceedings, including a ten-day trial, the district court held it unconstitutional.

Echoing the findings of the other district courts to have considered such laws, the Alabama court

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[23] Since the Alabama trial, the physician who provided abortions in Tuscaloosa retired, and his replacement has been unable to obtain local hospital privileges. Should the Alabama requirement be permitted to take effect, Alabama would be left with only *one* abortion provider – in the northern city of Huntsville. The Huntsville clinic, however, has also had significant difficulties hiring physicians with admitting privileges and complying with a related requirement that clinics maintain an agreement with an "outside covering physician" with hospital privileges. *West Ala. Women's Center v. Williamson*, No. 2:15-cv-497-MHT, ___ F. Supp. 3d ___, 2015 WL 4873125 at *5 (M.D. Ala. Aug. 13, 2015).

found that "none of the doctors who provide abortions in Montgomery, Birmingham, and Mobile would be able to obtain staff privileges that satisfy the requirements of [Alabama's privileges law] and that no doctors who currently hold or could obtain such privileges would begin performing abortions in those cities." *Strange*, 33 F. Supp. 3d at 1341. Local residency requirements imposed by hospitals on their medical staff members would prevent the clinics' current physicians, all of whom travel to Alabama to provide abortions, from obtaining privileges, as would requirements that physicians admit a certain number of patients on a regular basis. *Id.* at 1343.

Nor will any local physicians be willing to provide abortions. The district court found that this was so for several reasons, including that "the decision to perform abortions carries detrimental professional consequences in Alabama." *Id.* at 1348. Indeed, for example, the court found that affiliation by two physicians with the clinic in Huntsville resulted in protest activity that ultimately caused the complete loss of their private practices. Essentially, physicians must choose between providing abortion and maintaining their private practices. *Id.* at 1350.

Moreover, "violence against and harassment of abortion providers, beyond run-of-the-mill political protest, persist" and are a further barrier to doctors being willing to provide abortion. *Id.* at 1348. The district court noted that "abortion providers and women seeking abortions in Alabama today live and work in a climate of extreme hostility to the practice of abortion." *Id.* at 1334. The clinics offered many

"examples of doctors declining requests to affiliate with a clinic . . . out of fear for the physical safety of themselves and their families." *Id.* at 1352.

Evidence of this hostility was found in the proceedings themselves. Physicians for the plaintiffs, who were referred to only by pseudonyms to protect their identities and who appeared in open court behind a curtain, testified about "their daily fears for their professional livelihoods as well as their personal safety." *Id.* Dr. Mary Roe, a PPSE physician:

> testified that: "Every time I go to work, whether it's in Birmingham or Mobile, I'm always afraid that there will be somebody who is in the crowd who is passionate enough about the topic that they're willing to shoot. I worry about my children. I worry about my husband, my extended family." . . . As she delivered this testimony, there was a hush over the courtroom, as the court and all others in attendance heard the palpable fear in her voice.

Id. at 1351 (internal citations omitted). Dr. Roe's fears are far too real, as was shown with the shooting at a Planned Parenthood health center in Colorado Springs just this past November.

Being "firmly convinced that . . . [the requirement] would wipe out the availability of abortion services in Montgomery, Birmingham, and Mobile," *id.* at 1355, the district court outlined the devastating consequences that would result for Alabama women seeking abortion. First,

> [f]or [women living in poverty], going to another city to procure an abortion is particularly expensive and difficult. Poor women are less likely to own their own cars and are instead dependent on public transportation, asking friends and relatives for rides, or borrowing cars; they are less likely to have internet access; many already have children, but are unlikely to have regular sources of child care; and they are more likely to work on an hourly basis with an inflexible schedule and without any paid time off.

Id. at 1357. And, second, given the reduction in the number of available providers, all women seeking abortions would be harmed: "[T]here would simply be fewer abortions performed in the State than there would be women who would otherwise seek to obtain them . . . prevent[ing] some women and harmfully delay[ing] other women from obtaining abortions." *Id.* at 1362. Because of the difficulties of compliance with the burdensome regulations faced by all of the clinics in Alabama, the district court noted the "significant likelihood that Alabama would be left in the foreseeable future without a single abortion clinic." *Id.* Finding the "obstacles imposed by the . . . requirement more severe than warranted by the State's [health-related] justifications for the regulation," *id.* at 1377, the district court protected the continued availability of abortions in Alabama and struck the requirement.

This Court should do the same with Texas HB 2, and ensure not only that women in Texas, but also

women in other states like Wisconsin and Alabama, are able to continue to access safe and legal abortions.

B. Courts Have Enjoined Other Types of Abortion Restrictions That Block Women's Access to Abortion Without Furthering Women's Health.

ASC and admitting privileges requirements are not the only abortion restrictions that states have enacted in recent years, claiming that they further women's health when they in fact do not. Therefore, the Court's ruling in this case will impact not only Texas, and its ASC and admitting privileges requirements, but other abortion restrictions as well. It is critical to women's ability to continue to access safe abortion that the Court's ruling requires meaningful scrutiny of laws that restrict abortion for the asserted purpose of promoting women's health.

For example, several states, including Texas, Ohio, and Arizona, have restricted the provision of safe, early abortion by placing medically unwarranted limits on the use of medication abortion. Medication abortion typically involves two kinds of prescription pills, mifepristone and misoprostol, and for approximately fifteen years, women who are no more than nine or ten weeks pregnant have been able to utilize those medications to end their pregnancies.

Mifepristone was approved by the Food and Drug Administration ("FDA") in 2000. The approval was based on clinical trials that were completed before

1996 and demonstrated that a certain regimen was safe and effective through seven weeks of pregnancy. Accordingly, the approved mifepristone label reflects that regimen and that gestational age. But, even by 2000, additional studies showed that a protocol different from the one on the label – requiring less mifepristone and one fewer visits to the clinic – was superior and could be safely and effectively used later in pregnancy. *Planned Parenthood Ariz., Inc. v. Humble*, 753 F.3d 905, 907-08 (9th Cir.), *cert. denied*, 135 S. Ct. 870 (2014).[24] Such an "evidence-based" or "off-label" use is common in medicine and has been recognized by the FDA as good medical practice.[25] Therefore, the overwhelming majority of the more than two million American women who have safely

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[24] Melanie Wiegernick *et al.*, *Medical Abortion Practices: A Survey of National Abortion Federation Members in the United States*, 78 Contraception 486, 489 (2008) (finding that as early as 2001, just four percent of surveyed providers reported using the regimen on the FDA label).

[25] *See Allergan, Inc. v. Alcon Labs., Inc.* 324 F.3d 1322, 1324 n.1 (Fed. Cir. 2003) (per curiam); *Wash. Legal Found. v. Henney*, 202 F.3d 331, 333 (D.C. Cir. 2000); U.S. Food & Drug Admin., *Use of Approved Drugs for Unlabeled Indications*, 12 FDA Drug Bulletin 4, 5 (Apr. 1982) ("[A]ccepted medical practice often includes drug use that is not reflected in approved drug labeling."); U.S. Food & Drug Admin., *Regulatory Information: "Off-Label" and Investigational Use of Marketed Drugs, Biologics, and Medical Devices – Information Sheet*, http://www.fda.gov/RegulatoryInformation/Guidances/ucm126486.htm (last updated June 25, 2014) ("Good medical practice and the best interests of the patient require that physicians use legally available drugs, biologics and devices according to their best knowledge and judgment.").

used mifepristone to terminate an early pregnancy have followed an evidence-based protocol different from the one on the mifepristone label. That protocol is considered "best practices . . by practicing doctors," including leading professional organizations, such as the American College of Obstetricians and Gynecologists. *Id.* at 908; *see also id.* (evidence-based protocol has "clear advantage" over the label protocol, including because it results in a lower rate of ongoing pregnancies and requires fewer surgical interventions to complete the abortion).[26]

Nevertheless, several states have sought to reverse this medical progress, and buck the recommendations of leading medical groups, by requiring physicians to use the outdated protocol. By doing so, those states have banned medication abortion after seven weeks (when it is otherwise available until nine or ten) and required that, if medication abortion is offered, women follow the rarely used, outdated protocol. *See id.* at 915-16. Thus, despite claiming to further women's health, these states have mandated

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[26] *See also* Am. Coll. of Obstetricians & Gynecologists, *Practice Bulletin No. 143: Medical Management of First Trimester Abortion* 2 (Mar. 2014) ("Based on efficacy and the adverse effect profile, evidence-based protocols for medication abortion are superior to the FDA-approved regimen."); Br. of Amici Curiae Am. Coll. of Obstetricians & Gynecologists & Am. Med. Ass'n in Supp. of Pls.-Appellants & in Supp. of Reversal, *Planned Parenthood Ariz., Inc. v. Humble*, 753 F. 3d 905 (9th Cir. 2014) (No. 14-15624).

"a less safe, less effective treatment regimen." *Id.* at 916.

Planned Parenthood affiliates in Ohio and Texas *Amici*, along with other providers, challenged the Ohio and Texas restrictions, but those courts did not consider if the restriction actually promoted women's health, and those laws were upheld. *See Planned Parenthood Southwest Ohio v. DeWine*, 696 F.3d 490 (6th Cir. 2012); *Abbott*, 951 F. Supp. 2d at 906. Consequences for women in those states have been dramatic. In Ohio, the number of medication abortions declined precipitously even while medication abortions increased nationally. One Planned Parenthood Ohio affiliate saw use of medication abortion plummet from 37% of all first trimester abortions to 14%.[27] The effects of this type of restriction are also stark in Texas, with the number of medication abortions declining by 70%.[28]

And medical research in those states following implementation of those laws is beginning to confirm that mandating the outdated label protocol harms women's health. For example, upcoming research involving the operation of Ohio's restriction shows that the outdated label requirement has increased

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[27] Decl. of Timothy Kress, M.D. §§ 4-5, Pls.' Rep. in Supp. of Mot. for TRO & Prelim. Inj., Ex. 2, *Planned Parenthood Ariz. v. Humble*, 13 F. Supp. 3d 1017 (D. Ariz. 2014) (No. 14-01910).

[28] Daniel Grossman *et al.*, *Change in Abortion Services After Implementation of a Restrictive Law in Texas*, 90 Contraception 496, 499 (2014).

the need for medical intervention subsequent to the abortion.[29]

By contrast, the U.S. Court of Appeals for the Ninth Circuit has preliminarily blocked a similar Arizona law from taking effect, in a challenge brought by Planned Parenthood Arizona and another provider. That court looked at the evidence before it, and held that the law could not stand when the burdens it imposed were weighed against the state's justifications. *Humble*, 753 F.3d at 913. The *Humble* court explained that because many women do not discover they are pregnant in the first seven weeks (when the label regimen is available), the "law will effectively ban medication abortion outright . . . [f]or a significant number of women." *Id.* at 915.

Moreover, for women who are still within the window in which the regimen is available, the extra dosage of the medication and the extra clinic visit require at least $200 more than the evidence-based regimen, not including the costs to the patient involved with the additional trip. "[T]hese increased costs would reduce the number of women who receive abortions, many of whom . . . are poor. . . [F]or these women, the additional costs are significant and

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[29] Ushma Upadhyay, *Abstract P12: State Law Requiring FDA Protocol for Medication Abortion is Associated with Increased Need for Additional Interventions*, 92 Contraception 359, 367-68 (2015), http://dx.doi.org/10.1016/j.contraception.2015.06.062; ACOG, *Medical Management of First Trimester Abortion*, *supra* note 26, at 11.

sometimes prohibitive." *Id.* at 916. Perhaps most importantly, the *Humble* court recognized that requiring women to follow the outdated regimen, rather than promoting women's health as the state claimed, would actually impose "increas[ed] heath risks." *Id.* It, therefore, was likely to impose an undue burden.

As is demonstrated from these cases that Planned Parenthood affiliates have litigated in the past several years alone, the Court's ruling in this case will impact not only millions of women in Texas, but women seeking abortion throughout the country. For more than forty years, this Court has protected women's right to choose abortion and in order to ensure this protection is meaningful for all women, it should declare Texas HB 2 unconstitutional.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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